SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 553

JOSEPH C. LENIHAN, ET AL., IN THEIR OWN BEHALF AS SUBSCRIBERS AND USERS OF THE SERVICE OF THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, ETC., ET AL.,

Petitioners,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION OF JOSEPH C. LENIHAN AND JOSEPH P. KILROY FOR A REHEARING.

DAVID J. ERICKSON,
ARTHUR LEGHEUSE,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 553

JOSEPH C. LENIHAN AND JOSEPH P. KILROY, IN THEIR OWN BEHALF AS SUBSCRIBERS AND USERS OF THE SERVICES OF THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION, AND ON BEHALF OF ALL PERSONS, CORPORATIONS AND ASSOCIATIONS WITHIN THE METROPOLITAN AREA OF ST. PAUL, MINNESOTA, WHO ARE SIMILARLY SITUATED AND AS MAY CARE TO JOIN IN THIS ACTION,

Petitioners,

AND

CITY OF ST. PAUL, A MUNICIPAL CORPORATION,

Intervener-Petitioner,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, A CORPORATION,

AND

CHARLES MUNN, HJALMER PETERSON AND FRANK W. MATSON, INDIVIDUALLY AND AS MEMBERS OF THE RAILROAD AND WAREHOUSE COMMISSION, THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF MINNESOTA,

Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

Come now the above named petitioners and present this their petition for rehearing of their petition for writ of certiorari, and in support thereof respectfully show:

This case was presented to this Court on petition for certiorari to review a decision of the Supreme Court of Minnesota reversing a judgment of the State District Court of Ramsey County, Minnesota, dated December 15, 1939, whereby said District Court duly adjudged and decreed that a rate order of the Railroad and Warehouse Commission of said State, dated May 2, 1939, was void and unenforceable insofar as it purported to authorize and increase in the charges for telephone service in the City of St. Paul exchange area over the charges authorized in an order of the Commission promulgated March 31, 1936, and also permanently enjoining the respondents from enforcing said May 2, 1939, telephone rate order in said St. Paul metropolitan exchange area insofar as it purported to authorize charges for telephone service in excess of those authorized by said order of March 31, 1936 (R. 142-144). The said Supreme Court by its opinion and final judgment intended to make effective said order of the Railroad and Warehouse Commission of Minnesota, dated May 2, 1939, notwithstanding the fact that said order was made without notice, hearing, evidence and findings of fact based upon evidence (R., Proc. St. Sup. ct. pp. 1 to 29; pp. 29, 30; p. 16 f. 3).

On December 16, 1940, this Court entered the following order in this cause:

"The petition for writ of certiorari is denied."

The Federal Question Was Properly Presented—Both Expressly and Under the "Rule of Clear Intendment"—And Was Necessarily Passed Upon by the State Courts.

It is, and has been throughout this proceeding, petitioners' contention that said order was adopted in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States. As pointed out in the petition for certiorari (pp. 9-26) the Federal question was

raised in both the District and Supreme Courts in express terms. The opinion of reversal by the Minnesota Supreme Court, 293 N. W. 601, also appears at pp. 1-20, Proc. St. Sup. Ct. and has been analyzed fully at pp. 50-55 of the petition for certiorari and supporting brief.

It is submitted that when the foregoing referred to analysis of the record is considered—and we now press it upon the Court—neither reason nor authority justify the contention of respondents that no Federal question was presented to the State Court nor decided by it. Assuming *arguendo* that the Federal question could have been raised with perhaps more precision, it is suggested that, in the above referred to state of the record, in the State District and Supreme Courts, it does not lie in the mouth of respondents to assert that anybody was in any doubt whatever of the primary contention of these petitioners, viz: that said May 2, 1939, rate order was adopted, in violation of and contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States, without notice of hearing, without evidence, and contained no findings of fact based upon evidence.

Applying the "clear intendment" doctrine, this Court has repeatedly sustained its jurisdiction over cases from the State courts wherein the Federal question appeared much less clearly and less insistently than it does in this case. As early as *Bridge Proprietors* v. *Hoboken*, 1 Wall. 116, 143, this Court pointed out that

> "It is objected, however, by the defendants, that the pleadings do not, in words, say that the statute is void because it conflict with the Constitution of the United States, and do not point out the special clause of the Constitution supposed to render the Act invalid.
>
> "It would be a new rule of pleading and one altogether superfluous to require a party to set out specially the provision of the Constitution of the United States, on which he relies for the action of the court in

> the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant, in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: 'This paragraph of the Constitution is the one involved in this case.'
>
> "Very few questions have been as often before this court as those which relate to the circumstances under which it will review the decision of the state courts; and the very objection now raised by defendants has more than once been considered and decided" (1 Wall., at p. 142).

And as recently as *People ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 67, the Court reaffirmed the doctrine that no particular form of words or phrases is essential; that it is necessary only that the Federal claim and the ground therefor be brought to the attention of the State court with "fair precision", and that "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented."

This doctrine has had abundant application and statement by this Court, as shown by the authorities listed in the margin.[1]

In *Columbia Water Power Co.* v. *Columbia Electric St. Ry. L. & P. Co.*, 172 U. S. 475, 485, 488, this Court sustained

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[1] *Green Bay & Miss. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 67, 68; *St. Louis, I. M. & S. Ry. Co.* v. *Starbird*, 243 U. S. 592, 598, 599; *Whitney* v. *People*, 274 U. S. 357, 360; *Powell* v. *Supervisors*, 150 U. S. 433, 440; *Sayward* v. *Denny*, 158 U. S. 180, 184; *Wedding* v. *Meyler*, 192 U. S. 573, 581; *Yazoo & M. V. R. Co.* v. *Adams*, 180 U. S. 41, 48; *California Bank* v. *Kennedy*, 167 U. S. 362, 365, 366; *Dewey* v. *Des Moines*, 173 U. S. 193, 199; *Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 657; *Toledo, St. L. & W. R. Co.* v. *Slavin*, 236 U. S. 454.

jurisdiction, pointing out that the nature of the Federal question plainly appeared from the very theory of the pleadings, and that the decision of the State court necessarily involved decision of that question. Said the court:

> "* * * the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here" (R. 488).

And in *Long Sault Development Co.* v. *Call,* 242 U. S. 272, 277, it was pointed out:

> "In deciding this question, this court is not limited to the mere consideration of the language of the opinion of the state court, but will consider the substance and effect of the decision, and will for itself determine what effect, if any, was given by it to the repealing act."

In the present case it is clear that the effect of the State Supreme Court judgment here in suit is to give effect to the challenged order.

The Challenged Order is Void Because the Jurisdictional Prerequisites of Notice, Hearing, Evidence and Findings Prescribed and Required by the State Statutes and the Due Process Clause of the Fourteenth Amendment of the Federal Constitution Were Ignored.

It cannot be gainsaid that petitioners were entitled to notice, hearing and opportunity to present evidence and findings before the rate fixing commission enacted the challenged order. This right "is one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amend-

ment as a minimal requirement." *Ohio Bell Telephone Co.* v. *Pub. Utility Comm.*, 301 U. S. 292, 304, 305. This right is also recognized and protected by the State Statutes (see District Ct. memo, R. 61-63). It is admitted by the respondents and found by both the District and Supreme Courts that this right to notice hearing, evidence and findings was denied. The *order* is void on its face because of fundamental procedural and jurisdictional defects. *Wichita R. & L. Co.* v. *Pub. Util. Comm.*, 260 U. S. 48, 58, 59. It will be noted that the action in the *Wichita* case to enjoin the Kansas Commission from putting the increased rates in force was brought by a *customer*, the same as in the instant case. Section 13 of the Kansas Utility Act contained a provision almost identical with Section 5291 of Mason's Minn. Stats. of 1927. In construing said Section 13, Mr. Chief Justice Taft said:

> "* * * We conclude that a valid order of the Commission under the act must contain a finding of fact after hearing and investigation, upon which the order is founded, and that for lack of such a finding, the order in this case was void.
>
> "This conclusion accords with the construction put upon similar statutes in other states.
>
> "* * * We rest our decision on the principle that an express finding of unreasonableness by the commission was indispensable under the statutes of the state."

The *Wichita* case, *supra*, was reaffirmed in *Mahler* v. *Eby*, 264 U. S. 32, 68 L. Ed. 548, and in *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 79 L. Ed. 446, on "general principles of constitutional government."

"As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the grounds of invalidity asserted by plaintiffs." *B. & O. R. Co.* v. *United States*, 264 U. S. 258, 265, 266.

The omission of notice and hearing "goes to the very foundation of the action", *Morgan* v. *United States et al.*, 304 U. S. 1, 14. The defect is jurisdictional. * * * It goes to the existence of the power on which the proceeding rests", *Mahler* v. *Eby*, 264 U. S. 32, 43, 45, and is "fundamental in its nature", *Northern P. R. Co.* v. *Dept. of Public Works*, 268 U. S. 39, 44. "A finding without evidence is beyond the power of the Commission", *U. S.* v. *Abilene & S. R. Co.*, 265 U. S. 274, 288.

It is important to note that in Minnesota appeals from orders of the Commission under the Telephone Act are governed by Sec. 5308, Mason's Minn. Stats. of 1927, which provides that the appeal "shall be determined upon the pleadings, evidence, and exhibits introduced before the Commission." The court in Minnesota, therefore, considers both the law and the facts upon the record made before the Commission, and not upon new evidence. In such circumstances judicial review would be no longer a reality if the practice followed by the Commission in this case were to receive the stamp of regularity. The order could find no validity in anything that was the subject of its recitals since it had no evidence for its support (Rec. Proc. St. Sup. Ct., pp. 5 to 10, incl.) (R. 136, 137, Dist. Ct. Memo). To paraphrase the language of this Court in *Ohio Bell Telephone Co.* v. *Public Utilities Com.*, 301 U. S. 292, 303, 304: How was it possible for the appellate court to review the law and the facts and intelligently to say the findings of the Commission were supported by the evidence when the evidence that it approved was unknowable. What the Supreme Court of Minnesota did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.

The Fourteenth Amendment as well as the State Telephone Act, charged the Commission with the duty of hold-

ing a hearing and proceeding in conformity with due process of law before enactment of the challenged order, and petitioners rightly insist upon the discharge of that duty. See *State* v. *Tri-State Tel. & Telgh. Co.*, 204 Minn. 516, 284 N. W. 294, 300, 301, 303. We direct attention to the quotation from this case at pp. 59-61 of our Brief in support of Petition. The Commission should be compelled to discharge its duty and to accord petitioners their fundamental rights. Surely this proposition is not open to dispute. If the Commission is not so compelled, then it will feel free to follow the example thus set in St. Paul with immunity.

Both the District and State Supreme Courts Found That the Injunction Suit was Properly Brought by the Petitioners and That They Had No Adequate Remedy at Law.

The issue here is essentially one of remedy for enforcement of rights admittedly denied. Injunction is the only means by which the Commission may be kept within its jurisdiction and compelled to discharge its duty. The Minnesota Supreme Court in this case said "* * * that the suit is properly brought by plaintiffs; that they have no adequate remedy at law * * *". (Rec. Proc. St. Sup. Ct., p. 10 f. 3.) Injunction is the only means for enforcing petitioners' rights to a hearing before the Commission. Mr. Justice Holmes, speaking for the court in *Waite* v. *Macy*, 246 U. S. 606, 610, recognized that the only effective means for keeping administrative boards within their statutory and constitutional jurisdiction and within lawful bounds was not an administrative remedy, but an equitable remedy. The learned Justice said that, "*We are satisfied that no other remedy, if there is any other, will secure the plaintiffs' rights.*" He further said that, "*the Secretary and the Board*

*must keep within the statute * * *, which goes to their jurisdiction * * *, and we see no reason why the restriction should not be enforced by injunction * * *"* (Italics ours).

In *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill,* 281 U. S. 673, 678, 679, 680, which is in point by analogy, Mr. Justice Brandeis, writing for the Court, among other things said:

> "* * * The State Court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available, and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property."

Thus, the State Supreme Court by denying to petitioners the only adequate remedy for enforcement of their right to a hearing before the Commission denied petitioners the right itself.

The said State Supreme Court in its previous decisions, had held that the jurisdiction of the Commission could be invoked only by compliance with the applicable statutory limitations and the fundamental law of the Nation—the Fourteenth Amendment.

State v. *Great Northern R. Co.,* 130 Minn. 57, 61, 62;
Dayton Rural Tel. Co. et al. v. *N. W. Bell Tel. Co.,* 188 Minn. 547, 551;
State v. *Tri-State Tel & Telgh. Co.,* 204 Minn. 516, 284 N. W. 294, 300, 301, 303.

These fundamental requirements clearly go to the jurisdiction and power of the Commission to act at all. The respondents in their answers admit (R. 82, 83) that they

ignored them. Thus, the Commission, in effect, admits that its act was beyond its jurisdiction and void. This order has no such legal validity as is required to form the basis of an appeal. The Attorney General of the State of Minnesota, refused to take an appeal from said order (R. 11, f. 3 & p. 12, f. 1). Under Sec. 5308 of Mason's Minn. Stats. 1927, the appeal there provided for shall be tried in the District Court on the pleadings, evidence and exhibits introduced before the Commission, as hereinabove indicated. There was not a scintilla of evidence introduced before the Commission as a basis for the challenged order. As pointed out by the trial court in its memorandum, "But this is an attack upon the order in its entirety. The complaint alleges facts which show that the Commission disregarded statutory and constitutional essentials to a valid exercise of its administrative authority. That the plaintiffs, and all other subscribers in the St. Paul Metropolitan Exchange Area, will suffer substantial pecuniary damages, will hardly be controverted. (Citations of State Cases) (R. 69, 70 & 71, f. 1).

This Court in *Arizona Grocery Co.* v. *A. T. & S. F. Ry.*, 284 U. S. 370, 76 L. Ed. 348, speaking thru Mr. Justice Roberts says:

> "Where the commission has upon complaint and after hearing declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when the previous order was promulgated, by declaring its own findings as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparations measured by what the commission now holds it should have decided in the earlier proceeding to be a reasonable rate." (p. 299.)

This demonstrates that, under the rulings of this Court, the Utility has a right to abide by the order made until

it is reversed by legal authority, either by the Court on review or by the Commission itself, upon evidence, with findings sustained by evidence that the old order has been or is now unreasonable, and to go through its quasi-legislative performance requires the exercise of due process.

This Court has also long recognized that judgments rendered in these circumstances are void and may be enjoined in the Federal courts. *Simon* v. *Southern Ry. Co.*, 236 U. S. 115; *A. T. & S. F. R. Co.* v. *Wells*, 265 U. S. 101; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 165; *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 183, 184. Nor does the fact that an adversely affected party, by such an order, might obtain a review in the Federal courts make any difference. The State itself must allow a judicial review in its own courts. *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331.

There is no admissible distinction between the challenged order and court judgments in this regard. The order operates in the nature of a judgment, and it is difficult to find a basis for the denial of injunctive relief against its enforcement when it is certain such relief would not have been denied against enforcement of a State court judgment rendered under similar circumstances.

The principles upon which the petition for certiorari is requested are of supreme importance. They pertain not only to administrative procedure under the local law, but also to the administrative law of the Nation. This Honorable Court has not hitherto considered those principles in the light of the peculiar facts presented in the instant case.

If it is to be the law that the highest court of a State will not award equitable relief from the enforcement of a quasi-judicial order which is void on its face because procedural due process of law was denied in its enactment, then such a rule should be authoritatively declared by the judgment of this Court.

In conclusion, petitioners call attention to the fact that this is not a case wherein the State Supreme Court has merely applied well settled State authority to the determination of the fundamental jurisdictional issues involved, nor has it been able to call upon authorities from prior decisions in other jurisdictions to support its conclusions. On the contrary, that court has had to spell out its decision without the benefit of a single controlling prior authority. Far from being based upon "sound principle and abundant authority", the decision below is directly in the teeth of "abundant authority" in the prior decisions of this Court and of other courts, as is fully set forth in our petition for certiorari, at pp. 23-29 and 43—and supporting brief pp. 43-62.

For the foregoing reasons, as well as those stated in the petition for certiorari and supporting brief, it is respectfully urged that this Petition for rehearing be granted and that upon such rehearing the order heretofore entered on December 16, 1940, be vacated and a writ of certiorari to the Supreme Court of the State of Minnesota be granted in this cause.

Respectfully submitted,

JOSEPH C. LENIHAN,
JOSEPH P. KILROY,
Petitioners.

By DAVID J. ERICKSON,
ARTHUR LESEUER,
206-8 Hodgson Bldg.,
Minneapolis, Minnesota,
Counsel for Petitioners.

I, David J. Erickson, of Counsel for the above named Petitioners, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

DAVID J. ERICKSON.

IN THE

Supreme Court of the United States

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JOSEPH C. LENIHAN and JOSEPH P. KILROY, in their own behalf as subscribers and users of the services of THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation, and on behalf of all persons, corporations and associations within the Metropolitan Area of St. Paul, Minnesota, who are similarly situated and as may care to join in this action,

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and

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Intervener-Petitioner,

vs.

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and

CHARLES MUNN, HJALMAR PETERSEN and FRANK W. MATSON, individually and as members of the Railroad and Warehouse Commission, THE RAILROAD and WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, J. A. A. BURNQUIST, individually and as Attorney General of the State of Minnesota,

Respondents.

PETITION OF CITY OF SAINT PAUL, PETITIONER, FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

HARRY W. OEHLER,
Corporation Counsel, City of Saint Paul,
LOUIS P. SHEAHAN,
Asst. Corporation Counsel, City of Saint Paul,
Attorneys for Petitioner, City of Saint Paul,
City Hall and Court House Building,
Saint Paul, Minnesota.

JAMES F. LYNCH,
ANDREW R. BRATTER,
County Attorney and Assistant
County Attorney, respectively,
of the County of Ramsey, State
of Minnesota,
Of Counsel.
City Hall and Court House Bldg.,
St. Paul, Minnesota.

Review Publishing Co., 141 E. Fifth St., St. Paul, Minn.

No. 553

A

ADDENDUM TO PETITION OF CITY OF SAINT PAUL, PETITIONER, FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

1. The State Supreme Court has construed the state laws, particularly Section 5291, Mason's Minnesota Statutes, 1927, so as to confer upon the Commission a pure delegation of legislative rate-making power, unfettered in its exercise, by legislative procedural standards. The state laws so construed are palpably in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution.

2. The petitioner submits that, however state laws may be construed, the same are displaced and superseded by the dominant question of federal due process.

3. The denial of the writ of certiorari sought by the petition in this cause will result in permanence of the decision and final judgment of the State Supreme Court herein, and the establishment of a rule respecting rate orders of the State Commission binding upon the federal courts of the Eighth Circuit, in utter discord with the otherwise uniform and universally applied rule, that there can be no constitutional pure delegation of the legislative power to prescribe public utility rates vested in a state commission unqualified in its exercise by procedural standards in the nature of requirements for notice, hearing, reception of evidence, and the making or findings relative to pertinent rate-making factors.

The decision and final judgment of the State Supreme Court herein, standing unreversed, will enjoin upon the Federal Courts of the Eighth Circuit, as respects the orders of said commission the application of the rule there an-

nounced when occasion for its application may arise. This will create diversity of decision of the several federal judicial circuits, and the subjection of the rate-paying public to the whim and caprice of said Commission and permit it to alter and increase established telephone rates by its order, in the nature of a mere administrative fiat, unattended by notice, hearing, the taking of evidence, or the making of findings, upon evidence, relative to the pertinent rate-making factors of fair value of rate base, operating expenses and revenues of the company to be regulated.

Wichita Railroad & Light Co. v. Public Utilities Comm. of Kansas, et al, 67 L. Ed. 124, 130, 260 U. S. 48, 59, 43 S. Ct. 51;

Panama Refining Co. v. Ryan, 293 U. S. 389, 430, 433, 79 L. Ed. 464, 465, 466;

Ohio Bell Teleph. Co. v. Public Utilities Comm., 81 L. Ed. 1093, 1101, 1102, 301 U. S. 292, 302 to 305 incl.

Erie R. Co. v. Tompkins, 82 L. Ed. 1188.

The petitioner reserves for consideration, in addition to the instant petition, the petition for the writ and the briefs in support thereof.

This cause presents a situation manifestly requiring correction and the reversal of the decision and final judgment of the State Supreme Court. The questions presented are of great public importance, and there are special and important reasons for the granting of the writ. The prejudicial effect of the Supreme Court decision and final judgment upon the public interests is not limited to the State of Minnesota but embraces the country at large, and will among other considerations cause a diversity of decision in the several judicial circuits of the United States.

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AUTHORITIES CITED.

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Respondents.

PETITION OF CITY OF SAINT PAUL, PETITIONER, FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes the above named petitioner, City of Saint Paul, petitioner, and presents this its petition for a rehearing of the petition for a writ of certiorari in this cause.

I.

JURISDICTION.

The petition for a writ of certiorari, in this cause, was filed, in this Honorable Court, on the 6th day of November, 1940, and was denied by the order of this Honorable Court on the 16th day of December, 1940. This petition is filed within less than twenty-five days thereafter, under Rule 33, Revised Rules of the Supreme Court of the United States adopted February 13, 1939, effective February 27, 1939. The said rule 33 reads as follows:

> "A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, unless the time is shortened or enlarged by order of the court, or a justice thereof when the court is not in session; and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment desires it, and a majority of the court so determines."

The time for the filing of a petition for such a rehearing has been neither shortened nor enlarged by any order of this Honorable Court.

II.

REASONS FOR PETITION FOR REHEARING.

1. The petitioner upon reanalysis of the petition for the writ of certiorari, the accompanying supporting brief and the petitioner's reply brief in response to the several briefs of the respondents opposing the petition for a writ of certiorari, after the denial of said petition, apprehends that such denial might be attributable to unfortunate selection of language or lack of clarity of expression, in the petition for the writ and the supporting briefs by reason whereof the dominant and controlling question of federal procedural due process under the Fourteenth Amendment to the Federal Constitution, upon the determination of which the final judgment of the State Supreme Court in this cause manifestly rested, was obscured.

The record demonstrates that this cause has for its purpose the adjudication as void and unenforcible and the enjoining of the enforcement of a telephone rate order superseding and increasing then established telephone rates applicable to the City of St. Paul Metropolitan Area made and entered by the Railroad and Warehouse Commission of the State of Minnesota, May 2, 1939, unattended by notice, hearing, the taking of evidence or the making of findings of fact pertinent to relevant factors, upon the ground alleged in the complaint that the order so made transgressed the due process clause of the Fourteenth Amendment to the Federal Constitution. The complaint alleged that said order transgressed the due process clause of the Fourteenth Amendment to the Federal Constitution upon the alleged facts that the same prescribed and promul-

gated a schedule of telephone rates applicable to the Metropolitan Area of the City of Saint Paul, chargeable by the respondent The Tri-State Telephone and Telegraph Company, the operating utility in said Area, in each instance appreciably in excess of the then duly established and authorized telephone rates applicable to said Metropolitan Area thereby provided to be superseded that said order was entered by said Commission without the institution of any proceeding, without notice of hearing, without the conduct of any hearing, without the taking of any evidence, without the making of any findings of fact or purported findings of fact relative to the fair value of the company's rate base, its operating expenses or revenues and without any finding or purported finding that any of the established and authorized rates, provided to be superseded and increased by the schedule of rates set forth in the assailed order, was inadequate or unreasonable and without any record of the Commission's action upon which a judicial review might be afforded upon the question of the reasonableness of said order or the rates thereby prescribed and promulgated. The said order is incorporated in the complaint on its face and by its recitals, its support is limited to irrelevant considerations, unrecorded and undisclosed information alleged to have been in the possession of the Commission, the desire for expediency and to be rid of harrassing delay and expense usually attendant upon rate investigations, the willingness of the Company to accept the new schedule thereby prescribed and promulgated and its promise to refrain from further attempts to carry on litigation respecting a separate and distinct rate proceeding then without the control and jurisdiction of the

Commission and then vesting exclusively in the jurisdiction of the State Supreme Court (Rec. pp. 1 to 33 incl.).

3. Neither the District Court nor the State Supreme Court dealt with any question pertaining to the reasonableness of the rates prescribed and promulgated by the assailed order since no such question was presented to either court. There was no evidence adduced before the Commission and thus no such judicial review could have been afforded. The said state courts were concerned only with the question of federal procedural due process, that is whether the said Commission in its procedure, pertaining to the enactment of said order, as distinguished from the reasonableness of the rates thereby prescribed, failed to satisfy the minimal requirements of the Fourteenth Amendment to the Federal Constitution relating to due process (Rec. pp. 1 to 33 incl., 78 to 120 incl., pleadings 38 to 44 incl., 129 to 141 incl., Dist. Ct. Mem.) (Rec. Proc. St. Sup. Ct. pp. 1 to 22 incl.).

4. The Federal Constitution by Article VI as here pertinent provides:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The due process clause of the Fourteenth Amendment to the Federal Constitution is supreme and paramount to any law of the state and any law of the state or any interpretation of any state law by the Supreme Court of the state in conflict with said due process clause of the Federal Con-

stitution as the same is written or interpreted by this Honorable Court must fail of effect.

5. The pleadings of the parties to this cause affirmatively established the fact that the assailed order was unattended by any notice, hearing, evidence or findings upon evidence. These fatal deficiencies are apparent from the face of the assailed order and its recitals. The Tri-State Telephone and Telegraph Company, in paragraph ten of its answer in the District Court, in this cause, admitted that said assailed order was unsupported by any evidence and denied that any such support was necessary to its validity, and further denied that the Commission was required to have or consider anything more than its said assailed order of May 2, 1939, shows it to have had and considered. The following is said paragraph ten of said Answer (Rec. pp. 28 to 33 incl. Order; 1 to 33 incl., Complaint; 78 to 120 Ans. & Repl.):

> "This defendant admits no formal testimony was taken from sworn witnesses and hence there was no formal examination of witnesses and no transcript of evidence as such. Defendant denies that such were necessary, or that the Commission was required to have or consider anything more than said order of May 2 shows it to have had and considered." (Record pp. 82 and 83).

The said District Court in this cause granted the petitioners-plaintiffs' motion, in which the petitioner-intervener, City of Saint Paul joined, for judgment on the pleadings and, pursuant thereto, the judgment of said District Court was entered and docketed December 15, 1939, adjudging and declaring said assailed order invalid and unenforcible, insofar as the same purports to prescribe rates applicable

to said Metropolitan Area of the City of Saint Paul in excess of the rates prescribed therefor by the prior order of the Commission dated March 31, 1936 (Rec. pp. 125 to 144 incl.).

The Tri-State Telephone and Telegraph Company, defendant-appellant, in this cause, in the State Supreme Court, alone appealed from said District Court judgment. The Railroad and Warehouse Commission of the State of Minnesota and the Attorney General of said State, the other defendants, in this cause, in said District Court, took no appeal from said District Court judgment and, to all intents and purposes, acquiesced therein (Rec. Proc. St. Sup. Ct. 1-20 incl. Rec. 145, 146).

The said appeal of The Tri-State Telephone and Telegraph Company to said State Supreme Court from said judgment of said District Court was heard and said State Supreme Court entered its opinion thereon in said Court on the 5th day of July, 1940, providing for the reversal of said District Court judgment (Record, Proc. St. Sup. Ct. pp. 1 to 22 incl.).

The said State Supreme Court, by its order dated August 19, 1940, stayed all proceedings upon said appeal in said State Supreme Court except the entry of said final judgment (Record, Proc. St. Sup. Ct. pp. 23, 24).

The final judgment of said State Supreme Court reversing said judgment of said District Court was entered and docketed in said State Supreme Court on the 21st day of August, 1940 (Record, Proc. St. Sup. Ct. pp. 29, 39).

6. This action was instituted and prosecuted by the petitioners-plaintiffs and the petitioner-intervener in their own behalf as subscribers and users of the services of the

said public utility company within said Metropolitan Area and on behalf of all persons, corporations and associations within said Metropolitan Area similarly situated. The federal question and the federal right especially set up in the complaint were based upon the due process clause of the Fourteenth Amendment to the Federal Constitution. The petitioners persisted in the assertion of their right to federal procedural due process and in their challenge of said order as void because of its palpable denial of such federal due process guaranteed to the subscribers of the utility and the public by virtue of the Constitution of the United States. The federal question thus presented went to the very root of this case and dominated every part of it and the same displaced and superseded every principle of general or local law which, but for such federal constitutional grounds, might have been sufficient for the complete determination of this action. The record demonstrates that the determination of the federal question thus presented by the complaint was the basis for the judgment of the District Court and was also the foundation upon which the final judgment of the State Supreme Court rested. The District Court in its memorandum (Rec. p. 61) ruled as follows:

> "The complaint alleges that the order was made without notice or a hearing or the receiving of evidence. The court is of the opinion that this allegation states a cause of action grounded upon a denial of the minimum constitutional requirements essential to due process and upon the absence of procedural steps mandatory under the statutes for a valid and binding order."

The record of the proceedings in the State Supreme Court, in this cause, demonstrates that the decision of the State

Supreme Court was based upon the determination of said federal question. The State Supreme Court said:

> "The theory of the plaintiffs and the trial court as set forth in the learned memoranda of 28 pages accompanying the order over-ruling defendants' demurrers to the complaint and the order for judgment on the pleadings, is that the order of May 2, 1939, is void because there was no notice of hearing, no testimony taken and no findings of fact contained therein sufficient in law to sustain it."
>
> * * * "But it appears to us that regardless of the fact that the order of May 2, 1939, was made without notice of hearing, without the taking of testimony and the claimed deficiency as to findings, it is nevertheless valid." (Rec. Proc. St. Sup. Ct. p. 12, f. 3; p. 16, f. 3).

The State Supreme Court in its decision also said:

> "Plaintiffs contend that sec. 5298 of the code requires the commission to 'give all interested parties a chance to furnish evidence and be heard.' But that is when the commission deems it needful to have a valuation of all the property invested in the utility, as was done prior to the order of March 31, 1936. And, of course, then sec. 5307 applies." (Rec. Proc. St. Sup. Ct. pp. 17, 18).

The State Supreme Court in its decision further said:

> "In the case where a telephone company presents a proposal to increase or decrease or change its rates, it, of course, consents thereto, so that it cannot thereafter raise any claim that the rate is confiscatory. The commission in determining whether the proposed new schedule of rates is just and reasonable need not necessarily have a valuation of the company's property and a tedious and expensive litigation. It may already have knowledge of the situation. No statute is pointed

to which prescribes that there must be notice given of hearings and testimony taken if the commission has all the necessary information for determination whether the rates proposed to supersede those in force are just and reasonable." (Rec. Proc. St. Sup. Ct. pp. 12, 13).

7. The State Supreme Court in its said decision set forth the substance of the federal question, omitting to label or specifically designate the same as a federal question, and decided the same adversely to the claims of the petitioners. The decision of the federal question so presented was necessary to the determination of the State Supreme Court and the decision and final judgment of the State Supreme Court as made and entered could not have been made and entered without the decision of said federal question. The said federal question was the dominant pivotal, all-encompassing and all-controlling question upon the determination of which the final judgment of the State Supreme Court in this cause depended. The omission of the State Supreme Court to label or specifically designate the federal question so presented and so determined as a federal question manifestly could not detract from its character as a federal question.

Chicago B. & Q. R. Co. vs. Illinois, ex rel. Grimwood, 50 L. Ed. 596, 604.

The assailed order prescribes and promulgates a schedule of telephone rates applicable to said Metropolitan Area the enforcement of which will result in the imposition upon the rate-paying public of an additional burden of approximately three hundred thousand dollars annually over and above that resultant from the enforcement of the previous established and authorized rate schedule sought to be super-

seded and increased thereby (Rec. p. 43, ff. 2, 3 and p. 57, ff. 2, 3).

8. The public and the users of public utility service in the matter of the prescription of rates, by order of a state rate making commission such as the Railroad and Warehouse Commission of the State of Minnesota, possess a right secured to them by said amendment to the Federal Constitution to insist upon the Commission's compliance with the minimal requirements of due process provided to be afforded by said constitutional amendment as the same has been construed and applied in the decisions of the United States Supreme Court. Railroad Com. of Cal. vs. Pac. G. & E. Co., 82 L. Ed. 319, 322, 302 U. S. 388, 392, 393; Ohio Bell Telph. Co. vs. Public Utilities Com., 81 L. Ed. 1093, 1101, 1102, 301 U. S. 292, 302 to 305 incl.; Interstate Commerce Com. vs. Louisville & N. R. Co., 57 L. Ed. 431, 433, 434, 227 U. S. 88, 91; St. Joseph Stock Yards Co. vs. United States, 83 L. Ed. 1033, 1041, 1052, 298 U. S. 38, 73; Morgan vs. United States, 80 L. Ed. 1288, 1294, 1295, 298 U. S. 468, 480, 481; Smith vs. Ames, 42 L. Ed. 819, 842, 847, 848, 849, 169 U. S. 466, 527, 528, 540, 541, 543, 544, 545, 547.

9. The State Supreme Court decision and final judgment impute to the State Commission a pure delegation of the legislative power to prescribe public utility rates unfettered in its exercise by requirements for notice, hearings, the taking of evidence and the making of findings of fact pertinent to essential factors based upon evidence taken and recorded. This Honorable Court has uniformly construed and applied the due process clause of the Fourteenth Amendment to the Federal Constitution so as to forbid such a delegation

of the legislative rate making power to a state commission.

Wichita Railroad & Light Co. vs. Public Utilities Commission of the State of Kansas, et al., 67 L. Ed. 124, 130, 260 U. S. 48, 59, 43 S. Ct. 51;

Panama Refining Co. vs. Ryan, 293 U. S. 389, 430, 433, 79 L. Ed. 446, 464, 465, 466.

(Cases supra.)

Section 5308, Mason's Minnesota Statutes 1927, applicable to telephone rate proceedings conducted by the said State Commission provides:

> "Any party to a proceeding before the commission or the attorney general may make and perfect an appeal from such order as provided in Sections 1971-1972, Revised Laws of 1905, and acts amendatory thereof."
>
> "Upon such appeal being so perfected it may be brought on for trial at any time by either party upon ten days' notice to the other and shall then be tried by the court without the intervention of a jury, and shall be determined upon the pleadings, evidence and exhibits introduced before the commission and so certified by it."

This quoted section of the Minnesota statutes has been construed by the State Supreme Court as permitting a subscriber to telephone service to become a party to a rate proceeding before the Commission and to appeal from its order prescribing telephone rates and as conferring upon the attorney general of the state the right to appeal from such an order of the Commission in the interests of the public in cases where he shall deem the rates prescribed to be excessive. The construction of said statute mentioned is contained in State v. Tri-State Telephone Co., 146 Minn. 247, 250. The court said:

> "The right of appeal is purely statutory. The legislature may give or withhold it at its discretion. If it gives a right, it may do so upon such conditions as it deems proper. (Citing cases.) A telephone user, who believes that the rates approved by the Commission are higher than they should be, cannot appeal, unless he was a party to the proceeding in which the rates were sanctioned. If not such a party, his sole remedy is to procure an appeal to be taken by the attorney general."

The Court upon such an appeal is limited for its determination to a review of the pleadings, evidence and exhibits introduced before the Commission. The legislature clearly intended to provide by said statute for a judicial review of the Commission's rate orders upon appeals therefrom by subscribers who were parties to the proceedings or by the attorney general in the interests of the subscribers and the public. This right of judicial review is nullified by the decision and final judgment of the State Supreme Court in this cause. The State Supreme Court in this cause has fixed as the only jurisdictional prerequisite to an order of the state commission altering and increasing established telephone rates the consent of the utility company to be thereby regulated. Federal due process requires that the procedure followed by the Commission shall embrace all the rudiments of a fair trial with opportunity to present evidence and be heard accorded to every litigant, that the Commission in the prescription of public utility rates shall act upon evidence taken and recorded in the proceeding from which its order emanates and that it shall not act arbitrarily or capriciously and that whatever is done in such cases by the Commission shall be so done that satisfactory judicial review may be had of the reasonable-

ness of the order made both as respects the utility and the public.

Chicago, M. & St. P. R. Co. vs. State of Minn., 33 L. Ed. 970, 981, 134 U. S. 418, 458.

9. The previous decisions of this Honorable Court have consistently held that state rate fixing commissions, conditional to affording due process required by the Fourteenth Amendment to the Federal Constitution, must, in the prescription and promulgation of public utility rates, give notice of hearing, act upon evidence relevant to pertinent factors, make findings of fact upon competent evidence respecting fair value of the rate base, operating expenses and revenues of the utility to be thus regulated, and other pertinent factors, and that an order fixing such rates must be based upon competent evidence adequate to sustain the Commission's findings and a record capable of judicial review upon the question of the reasonableness of the rates prescribed.

The assailed order is utterly bereft of any of the minimal requirements of a valid rate order, and upon its face and by its recitals, demonstrates its denial of due process to subscribers and patrons of the utilities with which it purports to deal in the matter of the prescription of rates and charges.

Railroad Com. of Cal. vs. Pacific G. & E. Co., 82 L. Ed. 319, 322, 302 U. S. 388, 392, 393.

Ohio Bell Teleph. Co. vs. Public Utilities Co., 81 L. Ed. 1093, 1101, 1102, 301 U. S. 292, 302, 303, 305.

Interstate Commerce Com. vs. Louisville & N. R. Co., 57 L. Ed. 431, 433, 277 U. S. 88, 91.

St. Joseph Stock Yards Co. vs. United States, 83 L. Ed. 1033, 1041, 1052, 298 U. S. 38, 73.

Morgan v. United States, 80 L. Ed. 1288, 1294, 1295.

III.

THE CONTROLLING QUESTION.

The controlling question, therefore, is:

Whether the assailed order so entered by the State Commission without the institution of any rate proceeding, without notice of hearing, without the conduct of a hearing, without the reception of evidence, without the making of findings of fact based upon competent evidence relative to the fair value of the company's rate base, its operating expenses or revenues supported only by its said recitals pertaining to the aforesaid irrelevant matters, prescribing and promulgating a schedule of rates appreciably in excess of the then established and authorized rates thereby provided to be superseded, violated the minimal requirements of due process guaranteed to the public and patrons of the regulated utility by Section 1 of the Fourteenth Amendment to the Federal Constitution?

The petitioner deems the assigned question sufficient for the instant purpose but expressly reserves for consideration all of those cited and set forth as "questions presented" on pages 17 to 19 inclusive of the petition for the writ herein. The State Supreme Court in this cause by its decision and final judgment determined this question in the negative adversely to the claims of the petitioners and thereby committed reversible prejudicial error. The said

decision and final judgment of said State Supreme Court are repugnant to the Constitution of the United States and deny to these petitioners as such subscribers of said utility company and to others similarly situated due process of law guaranteed to them by the Fourteenth Amendment to the Federal Constitution.

The petitioners submit that there was presented, in this case, a Federal question, specially set up in the said complaint by the claim that said assailed order violated the due process provisions of the Constitution of the United States; that said Federal question was decided by the opinion and final judgment of the Supreme Court of the State of Minnesota, in this cause, in a way not in accord with the applicable decisions of this Court, and that the Federal question thus presented and determined was substantial in character. (Rec. pp. 1 to 33 incl.). Railroad Com. of Cal. vs. Pacific G. & E. Co., 82 L. Ed. 319, 322, 302 U. S. 388, 392, 393; Ohio Bell Telph. Co. vs. Public Utilities Com., 81 L. Ed. 1093, 1101, 1102, 301 U. S. 292, 302 to 305 incl.; Interstate Commerce Com. vs. Louisville & N. R. Co., 57 L. Ed. 431, 433, 434, 227 U. S. 88, 91; St. Joseph Stock Yards Co. vs. United States, 83 L. Ed. 1033, 1041, 1052; 298 U. S. 38, 73; Morgan vs. United States, 80 L. Ed. 1288, 1294, 1295; 298 U. S. 468, 480, 481; Smith vs. Ames, 42 L. Ed. 819, 842, 847, 848, 849; 169 U. S. 466, 527, 528, 540, 541, 543, 544, 545, 547.

The pleadings, the orders, memoranda and judgment of the District Court and the record respecting the proceedings in the State Supreme Court, in this cause, demonstrate that the petitioners therein seasonably presented a Federal question of substance for decision to the highest court of

the state having jurisdiction, that its decision of the federal question was necessary to the determination of the cause and that it was actually decided, and that the final judgment of said Supreme Court, as rendered, could not have been given without deciding it (Rec. pp. 1 to 35 incl., 78 to 120 incl., pleadings, 38 to 44 incl., 51 to 77 incl., 129 to 141 incl., Dist. Ct. Mem.) (Rec. Proc. St. Sup. Ct. pp. 1 to 22 incl.).

The decisive question is federal in character arising under the Federal Constitution and on which the decision of the State Supreme Court is not final. It is for the state courts to determine the adjective as well as the substantive law of the state, however, such courts must, in so doing accord the parties federal due process of law. Whether acting through its judiciary, its legislature or administrative agencies a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Brinkerhoff-Faris Trust & Sav. Co. vs. Hill, 281 U. S. 673, 682.

The effect of the State Supreme Court decision and final judgment is to confer upon the Commission a pure delegation of the legislative power to prescribe rates unfettered in its exercise by requirements for notice, hearing, evidence and essential findings and to thus immunize its order increasing established rates from judicial review. If such result were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment to the Federal Constitution would

be obvious and such violation is none the less clear when such result is accomplished by the state judiciary in the course of construing an otherwise valid state statute since the Federal constitutional guarantee of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government. Brinkerhoff-Faris Trust & Sav. Co. vs. Hill, supra, p. 680.

IV.

PUBLIC IMPORTANCE.

There are manifestly special and important reasons of a public nature for the issuance of the writ sought and the review and the reversal of the State Supreme Court decision and final judgment in this cause. If said State Supreme Court decision and final judgment are to stand unreviewed and unreversed it will mean that the State Commission shall possess and exercise a power denied by the Federal Constitution to every other officer, administrative body and tribunal under our constitutional form of government and that said Commission shall be endowed, in contravention to the Federal Constitution, with the pure legislative power to prescribe and promulgate rates by mere administrative fiat unsupported or unattended by notice, hearing, the reception of evidence, the making of essential findings, immune in its actions from judicial review. Such authority, however beneficiently exercised in one case could be injuriously exerted in another, is inconsistent with rational justice and comes under the Federal Constitution's condemnation of all arbitrary exercise of power.

Interstate Commerce Commission vs. Louisville & N. R. Co., 57 L. Ed. 431, 433, 434, 227 U. S. 88, 91.

V.

For the foregoing reasons, the petitioner City of Saint Paul respectfully prays that a rehearing of the petition for a writ of certiorari in this cause be granted; that upon further consideration the order of this Honorable Court denying said petition for a writ of certiorari dated December 16, 1940, be revoked and vacated; that the writ of certiorari issue to the Supreme Court of the State of Minnesota as prayed for in the petition for such writ filed herein as aforesaid on the 6th day of November, 1940, and that this Honorable Court will proceed to review this cause upon certiorari and reverse the final judgment of the State Supreme Court in this cause.

HARRY W. OEHLER,
Corporation Counsel, City of Saint Paul,
LOUIS P. SHEAHAN,
Asst. Corporation Counsel, City of Saint Paul,
Attorneys for Petitioner, City of Saint Paul,
City Hall and Court House Building,
Saint Paul, Minnesota.

JAMES F. LYNCH,
ANDREW R. BRATTER,
County Attorney and Assistant
County Attorney, respectively,
of the County of Ramsey, State
of Minnesota,
Of Counsel.
City Hall and Court House Bldg.,
St. Paul, Minnesota.

I, Harry W. Oehler, Counsel for the above-named petitioner, City of Saint Paul, do hereby certify that the foregoing petition for a rehearing of the petition for a writ of certiorari, in this cause, is presented in good faith and not for delay.

HARRY W. OEHLER,
Attorney for Petitioner, City of Saint Paul.